United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1945

No. 342

STEVE ANDERSON, EARL TROMBLEY, LILLIAN SOCIA, ALBERT WATKINS, ARTHUR SIBBE, NELSON LUCHTMAN, RITA SCHULTE, individually, for and in behalf of themselves and others similarly situated; and LOCAL NO. 1083, UNITED POTTERY WORKERS of AMERICA, affiliated with the Congress of Industrial Organizations, Mt. Clemens Michigan,

Appellants,

vs.

MT. CLEMENS POTTERY COMPANY,
Mt. Clemens, Michigan,

Appellee.

BRIEF OF APPELLANTS

(Plaintiff Employees Below)

LEE PRESSMAN,
718 Jackson Place, N. W.,
Washington, D. C.

EDWARD LAMB,
1014 Edison Building,
Toledo, Ohio,

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit 26, Mich.

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BRIEF OF APPELLANTS

(Plaintiff Employees Below)

STATEMENT OF QUESTIONS INVOLVED AND POSITION OF PARTIES WITH RESPECT THERETO

I.

Are the plaintiff employees of the Mt. Clemens Pottery Company, appellants herein, under the record herein, entitled to compensation for working time spent upon the premises of the employer, at the employer's request, while performing production work for employer?

The District Court below found as a fact that the employees were on the premises of the employer, at the employer's request, producing goods for shipment in interstate commerce, and that the employer herein had sought to circumvent the provisions of the Fair Labor Standards Act of 1938. But the District Court held that the employees herein were entitled to compensation only for the time which they worked in excess of 7 minutes before the starting hour shown upon the time cards, in reporting in, in the morning and that the defendant should compensate employees for all minutes shown on the time cards, amounting to more than 7 minutes before the "regular starting hour," in the morning and over 5 minutes before the "regular starting time," in the afternoon. Regular starting time, the Court will note from the record herein, is the subsequent quarter hour after actual work is begun.

The plaintiffs (appellants herein) contend that they were entitled, under the facts established in this case, to compensation for all times shown upon the time cards, including periods up to 56 minutes a day. In other words, the employees have been deprived of compensation for the working time which they spent in reporting in, for instance, at 6:46 A.M., since the Company paid them only from the subsequent quarter hour, or 7:00 A.M. As the District Court below found specifically herein:

> "when they (foremen) told them (employees) that work would start at 6:45 o'clock, they likewise mentioned the hour of 6:31, or if 7:00 A. M. was the starting time, then 6:46 was also designated in some manner." (Transcript of Record, Vol. 1, page 288.)

The defendant company (appellee herein) contends that the employees are *not* entitled to be paid for the time shown upon their own time cards, nor in accordance with the formula adopted by the District Court below. The time

cards are the only records of time worked which the employer maintained under the requirements of the Fair Labor Standards Act, providing for the maintenance of accurate work records. The plaintiffs-appellants contend that they should be paid in accordance with the time cards, but if an alternative rule is adopted by this Court, that the formula approved by the District Court below should be adopted.

II.

When travel time is difficult of precise computation, may the District Court, as here, adopt a reasonable formula by which employees may be reimbursed for certain travel time spent upon employer's premises, at employer's request?

The plaintiff-employees say that the District Court had such authority under the decisions of the United States Supreme Court. The defendant company contends that the District Court had no such authority.

III.

May the employer charge the employees for tools used by the employees in productive work undertaken at the request of, and for the benefit of, the employer?

The plaintiffs (appellants herein) contend that such charges should be paid by the employer and that deductions from the wages of the employees may not be made for such a purpose.

The appellee herein says that it may deduct from the employees' wages for the tools used by the employees in such productive work.

The District Court below permitted the deduction from the pay-checks of the employees.

IV.

After judgment against the appellee company for unpaid overtime compensation, may the company deduct as credits against amounts owing the employees, various bonuses or gratuities given some of said employees several years before?

The company (appellee herein) says that it may deduct such gifts or bonuses. The plaintiffs-employees contend that the company should not be permitted to do so. The District Court below stated that to deduct such gratuities or bonuses would:

> "savor too largely of Indian giving, and this Court would not be a party to such a strained interpretation." (Transcript of Record, Volume I, page 291.)

V.

May the employees designate other employees to act in their behalf in the prosecution of an action for unpaid overtime compensation and minimum wages under the Fair Labor Standards Act of 1938, and in this connection, may such employees bring the action in behalf of all employees similarly situated?

The company (appellee herein) objects to the prosecution of the action herein for the named employees and even for those who have filed their designations of agents as aforesaid.

The employees (appellants) maintain that the action herein can be maintained not only for themselves, and all

employees specifically designating them as their agents but, under the terms of the Act, "for all employees similarly situated."

The District Court below permitted this action to be prosecuted by the named employees and permitted the United Pottery Workers, a local union, to remain as a plaintiff, but the District Court provided that only those employees could be represented or be entitled to judgment when specific designations had been filed with the Court. Such written authorizations specifically designated these plaintiffs as agents for the prosecution of this action.

VI.

Are piece-workers entited to pay at the rate of time and one half their regular rate of pay for work performed during hours in excess of the statutory number of hours set forth in the Act?

The appellee company claims that the Act does not apply to piece-workers. The plaintiffs (appellants) contend that the Act applies to all workers, including piece-workers. The District Court below specifically held that these piece-workers are "within the ambit of the Fair Labor Standards Act."

VII.

May the Circuit Court of Appeals, Sixth Circuit, having before it the Findings of Fact, Conclusions of Law, and the judgment of the District Court to the effect that employees should be paid for travel time according to a reasonable formula, and on the record herein, reverse said judgment and deny said employees compensation for said work time, in the absence of a showing that said District Court acted in bad faith, in an arbitrary fashion or abused its discretion?

HISTORY OF LITIGATION

The Mt. Clemens Pottery, Mt. Clemens, Michigan, the appellee herein, is the largest manufacturer of dinner ware pottery in the United States, and employs between 1,000 and 1,200 workers. Several individual employees instituted this action in the District Court of the United States, for the Eastern District of Michigan, on April 16, 1941. The plaintiffs included employees of various departments, and also a local union, the United Pottery Workers of America, CIO. The action originally named the S. S. Kresge Company, which owns all of the stock of the Mt. Clemens Pottery Company, and has a board of directors which is more or less identical with the board of directors of Mt. Clemens Pottery Company. The S. S. Kresge Company filed various motions to be released from the action, and Judge Frank A. Picard, on June 13, 1941, signed an order denying the motion of the Kresge Company to be dismissed as a defendant. On June 15, 1943, the plaintiff-employees voluntarily dismissed the S. S. Kresge Company as a defendant herein, without prejudice to their action against the Mt. Clemens Pottery Company.

The workers involved in this action were engaged in the production and manufacture of pottery articles practically all of which are shipped in interstate commerce throughout the various states of the United States. The action filed herein under Section 16(b) of the Fair Labor Standards Act of 1938 was "brought in behalf of the individual plaintiffs and in behalf of all others similarly situated, employees of the Mt. Clemens Pottery Company." (Transcript of Record, Volume I, Page 7).

The production employees involved, worked upon a piece-work basis generally, and a few worked upon an hourly rate basis. This action of the employees sought

compensation at time and one-half their regular rate of pay for the hours worked in excess of the statutory number provided for in said Act. The action also sought the recovery of the minimum wage of 30¢ an hour for some of the employees, and also sought to recover for tools and other facilities which had been deducted from the employees pay checks. The action asked an accounting and judgment for each of the plaintiff-employees, and for each of the other employees similarly situated.

The District Court required the plaintiffs to file designations with the clerk of the court, signed by each employee designating the plaintiffs as their agents in the prosecution of their action. These designations were filed by approximately three hundred employees. On January 28, 1942, U. S. District Judge Picard referred the cause to a special master, and thereafter testimony was taken for several months, the report of the special master being filed on March 23, 1943. On July 2, 1943, Judge Frank A. Picard entered the Opinion of the Court. On September 13, 1943, Findings of Fact and Conclusions of Law were entered by said District Court. The Court required the defendant to make a computation of the monies owing certain plaintiffs in accordance with a formula described in said Opinion of the Court set forth on *Page 239, Vol. I of the Transcript* herein and reported in *60 Fed. Supp.* 146. This computation was made, and judgment was entered thereon. The company appealed from this judgment, to the United States Circuit Court of Appeals for the Sixth Circuit, which Court set aside the judgment of the District Court in an Opinion reported in *149 Fed. (2nd) 461.* The Opinion of the Circuit Court of Appeals for the Sixth Circuit was filed on May 21, 1945, and is printed in the Transcript of Record herein and appears in Volume III, Pages 1587 to 1597 inclusive.

FACTS

The plaintiff employees in the production departments of the Mt. Clemens Pottery Company had a well established course to follow in checking in and undertaking their labors for the company. After entering the plant they went to a rest room, a cloakroom, or what they called a "bullpen" where they took off their street clothes, hung them up in a locker, changed to work clothes, prepared for the labors of the day, and then as their time for work approached, they went to the time clock, punched in and then went directly from the time clock to their departmental assignments. (A description of this procedure is given by the various plaintiffs, including Steve Anderson, whose testimony appears in *Transcript of Record, Volume I, Page 410, et seq.)* The various employees went to the different posts and work benches assigned them by the employer, some of them at places close to the time clock, some of them to places a couple of hundred feet from the time clock. It took between a half minute and a minute and a half to get into productive activities after punching the time clock.

The productive work for these piece workers is not the subject of too much dispute. In the Dipping Department, for instance, it was necessary for employees like Steve Anderson *(Vol. I, Page 411, Trans.)* to do some preliminary work like taking water off the glaze and stirring it up to the right density, so that the employees could dip it and use it in the production of pottery. The employees didn't stand around waiting, after punching the time clocks at the Mt. Clemens Pottery Company—they did productive work necessary to carry on the employer's business.

The entire department could punch through the time clocks in a minute or a minute and a half *(Trans. Vol. I, Page 411)*, and since the employees were on a group piece

work job, each employee saw to it that his co-workers in the undertaking rushed into productive labors without delay. The procedure of the named plaintiffs was followed by other employees. *(Transcript of Record, Vol. I, Page 412.)*

The plaintiff employees testified specifically as to the time required to get into productive work after punching the time clock. Steve Anderson testified that he would be at work one-half minute after punching the time clock *(Transcript of Record, Vol. I, Pages 410-411)*. The plaintiffs Metz and Larimer testified that they would be in productive work one to two minutes after punching the time clock. *(Transcript of Record, Vol. II, Pages 610-611.)*

This case reveals a curious and an unusual situation in employer-employee relations in the United States. The Mt. Clemens Pottery Company, through its foremen and supervisors, would require the employees to report in at work and punch the time clock as much as fourteen minutes before the regular starting time. The employees in various departments were given a starting time, of say, seven o'clock in the morning, or six-forty-five in the morning. They would then be told the night before the "regular" starting time, but they were told to be there and start work at 6:31 *(Transcript of Record, Vol I, Page 414)*. But the company paid the employees only from the subsequent quarter hour.

The process was repeated at noon when the employees went out to lunch. If they left at 11:44 they would be paid upon the basis that they had not been engaged in productive work after 11:30! The same process was repeated going in to work after lunch and when they left in the evening, so that in many instances this amounts to as much as 56 minutes a day, that is, as much as fourteen minutes time was "contributed" by employees four times a day.

The very first conclusion reached by the District Court below *(Transcript of Record, Vol. I, Page 240)* was that these employees were required to spend this extra time in the company's production without being compensated therefor! It is true that the employees objected, and that there were strikes over the matter. While the Court will realize that individually this might amount to less than a dollar a day per person, that when this process was repeated a thousand times a day, every day, that the "saving to the company" over the years was very large.

The District Court below went into the matter of the evidence covering work-time very extensively, and found, in its Opinion on July 2, 1943, *(Transcript of Record, Vol. I, Page 243)* that "the company was purposely depriving the working man of that which is the only thing he has to sell—his hours or minutes of labor."

The Court below, at the request of both parties exhaustively re-examined the evidence, and on March 3, 1944, filed Findings of Fact *(Transcript of Record, Vol. I, Page 288)*, and there the Court found as a fact the following:

> "After reviewing the record of the evidence adduced, the Court is convinced that plaintiff employees were in fact required by the foreman of the defendant as we stated in our earlier opinion that
>
> > 'When they (foremen) told them (employees) that work would start at 6:45; or if 7:00 A. M. was the starting time, then 6:46 was also designated in some manner. With this picture before us we cannot help but believe that there was a method in this formula beyond that expressed by the defendant's witnesses.'
>
> "This Court found specifically that defendant company through its foremen had sought to circum-

vent the Fair Labor Standards Act, but we also held that from the evidence, the company should be allowed seven minutes before the starting hour as time spent by employees in checking through time clocks and in going to their places of employment during the day. This Court thus attempted to visualize the realities of the situation and required defendant to compensate employees for all minutes shown on the time cards over seven before the starting hour in the morning and over five minutes before the hour set for beginning of the afternoon work."

The employees substantiated their working hours by the time clock cards. These were the only records maintained by the company, recording the working time. The company herein had the unusual and unfair method of computing working time of employees from the subsequent quarter hour after the employees checked in for work, and from the prior quarter hour when they checked out. The testimony revealed that all preparations for productive work, such as changing clothes, collecting tools and taking care of their personl needs was all undertaken by the employees prior to checking through the time clock.

I.

Activities and Findings of The Wage & Hour Division of The United States Department of Labor

The Court herein will notice running through the approximately thirty volumes of the record, that not only innumerable witnesses and records were paraded before the Special Master and District Court below, corroborating the testimony of the plaintiffs to the effect that they were being deprived of their wages for working time, but even more, the United States Government agency

charged with the enforcement of various features of the Fair Labor Standards Act, found that the Mt. Clemens Pottery Company was wilfully avoiding its lawful duties to these appellants-employees.

Mr. Harry A. Reifin, supervising inspector of the U. S. Department of Labor, Wage and Hour Division in Michigan was called as a witness by the employees *(Trans. of Record, Vol. III, Pages 1314 et seq.)*. His testimony is very important. He testified that he had personally observed working conditions at the Mt. Clemens Pottery Company and interviewed employees and the various officers of the company on several occasions. He advised the company that it was violating the Act and that it was subjecting itself to liability to the employees for unpaid overtime compensation. On September 8, 1941 (Plaintiff's Exhibit 91 Trans., Vol. III, Page 1547) he advised the company that it was incorrectly computing the actual time worked by the employees engaged in the production of goods for interstate commerce, and referred specifically to the cases where employees punched their time cards in at 6:31 and were not credited with working time until 6:45. On one occasion during a conversation in the office of the company's president, Charles Doll, on November 21, 1939, Supervising Inspector Reifin testified *(Trans. of Record; Vol. III, page 1324)* that

> "I informed him that time spent on the premises by any employees *who were required to be there by the company was to be considered as time worked regardless of whether they worked or not,*"

Mr. Reifin testified *(Trans. of Record, Vol. III, page 1325)*, after observing the actual plant operations, and seeing that the employees prepared themselves for work by changing clothes, taking care of personal needs, etc., *before* they punched the time cards,

> "There are benches provided for employees on which to sit until the time for them to punch in."

The personal observations of this governmental agent showed him the length of time which it took employees to go from the time clock to their work (Trans. of Record, Vol. III, page 1328-1330) and this largely substantiated the testimony of Steve Anderson (Trans of Record, Vol. I, page 400) as to the length of time which it took any employee to punch his time clock and then begin productive work. Mr. Reifin, therefore, made it abundantly clear to the company that in pursuing a policy which deprived its employees of as much as fifty six minutes a day could only result in a company liability to the employees under Section 16(b) of the Act. Instead of condoning this reprehensible practice, as the company contends, the Wage and Hour Division advised them that the company was courting litigation. As Mr. Reifin testified (Tran. of Record, Vol. III, page 1331):

> "I advised Mr. Doll, of his probable liability under section 16 (b) of the Act and also advised and cautioned him against a continuation of any practice where employees were permitted to work any amount of time for which they were not paid and which was not regarded as hours worked."

The overwhelming evidence as disclosed in the Record herein clearly indicates that the Wage and Hour Division specifically disapproved the practice which the company was following, that the employees were not being credited with time worked and that the company thought that it would "take a chance" with the practice of crediting the employees with the smaller amount of working time. As the District Court below indicated, while these minutes a day "may seem small," yet when it is multiplied many hundreds of times every day, the company secured "profits" from its workers in a very large amount (Trans. of Record, Vol. I, Page 243).

II.

The Company Ordered the Employees to Report for Work at a Particular Time

The District Court below found as a fact that the Company-appellee had sought to circumvent the Fair Labor Standards Act in ordering its employees to do work before the regular starting time for which the employees received no wages. As we have pointed out, Steven Anderson and other appellants testified that the employees were told the night before, usually in a departmental meeting, as to the time they were to be at work the following day. Indeed, those who did not report on the job before the so-called regular starting time were sent home or given time off (*Trans. of Record, Vol. I, Page 413*). Miss Lillian Socia also testified (*Trans. of Record, Vol. II, Page 740*) that one girl, Goldie Bernacki, who reported at only eight minutes to seven was sent home for being "late." Additional significant evidence, of course, before the Court below was that of the time cards which show many employees checking for work at exactly at 6:46 or 6:31 for months on end (*Trans. of Record, Vol. III, Pages 1197-1198*).

But the testimony went much further, even the foremen who issued the work orders for the appellee admitted the facts to be as outlined by the appellant-employees. For instance, Foreman Ernest A. Harms testified (*Trans. of Record, Vol. III, Page 1191*) as follows:

> "Q. (By Mr. Lamb): I notice that each of those days, irrespective of starting time, she starts one minute after the quarter hour or two minutes after the quarter hour, and in each of the times irrespective of the working time, she has had her time computed from the following quarter hours; is that correct (handing cards to witness)?

A. Where there is 6:16, her time was computed from 6:30.

Q. That is right, and where it is 6:31, it would be computed from 6:45, is that correct?

A. That is right.

Q. And then the total time computed for her under the company's method of computation that we understand to be to the succeeding quarter hour and so forth, her total computation by the company amounts, in that two week period to exactly 84 hours, is that correct?

A. I think that is correct. I haven't added it up, but I think that it is correct."

At (Trans. of Record, Vol. III, page 1205) of the Record, appears the following, asked of Mr. Harms, the foreman:

"Q. Do you advise the employees the day before what time they should check in?

A. I do advise them, yes."

Then another foreman, Carl Starner, was asked about the company's activities in instructing employees to be on the job at a particular time. On (Trans. of Record, Vol. III, page 1064-1065) the Record appears the following:

"Q. Did you determine the evening before from some source as to what the starting time would be for the next day?

A. We always knew ahead of time when the starting time would be.

Q. Did you get that information, Mr. Starner, or did you make that decision? Did you get the information from someone else or did you make the decision as to what time the employees should come in the next day?

A. Well, it wasn't always just my decision.

Q. But did you participate in it?
A. Yes, sir.
Q. And then you conveyed that information to the employees, is that correct, the day before so that they would know?
A. That is correct."

III.

Computation of Wages

While it seems difficult to realize that this procedure of depriving workers of pay for actual working time could exist in modern America, we wish to emphasize that the tricky bookkeeping, which always worked to the company's advantage, did not seem to stop with merely depriving the workers of pay for actual working time. The employees were required to sign receipts for their wages even before they knew what they were getting. The company, instead of fixing a rate of pay, merely divided the earnings of the employees by the number of hours worked over a period of two weeks. The Wage and Hour Division of the U. S. Department of Labor finally required the company to compute time up to the date of its directive upon a "work week" basis, as required by the Act, and the company made a restitution of the monies it had made by that method of bookkeeping to certain employees. Employees received not cash or checks, but an "order" to go downtown to a Mt. Clemens bank to draw upon their wages. These might be labeled mere petty inconveniences to the workers, if the taking away of the workers' one asset of his time might be deemed an "inconvenience."

But in this situation the company went ever so much further. It even charged the worker with the tools he used in the production of goods for the employer. These tools or facilities included sponges, scissors, finger cots,

pails and other articles. The company admitted, moreover, making up to thirty-three and one-third per cent profit in marking up the articles which it bought and charged to the employees!

The District Court expressed its "sympathy" with the position of the employees on this unauthorized deduction from the pay checks of the employees, "since it seems only fair that the employer furnish the working appliances used by employees in the operation of the business. Doubtless, the trend in industry is in this direction, and when such practice becomes universal no employer will suffer a competitive disadvantage by following it." In spite of the declaration of the Court below that the custom of an industry could not violate the terms of the Act of Congress, the Court, nevertheless, refused to terminate the deductions for tools (*Trans. of Record, Vol. I, Page 246*) The worker-appellants insist that the decision of the Court violates the prevailing court decisions including the case of *Walling v. Peavy-Wilson Lumber Co. (D.C. La. 1943,* 49 U. S. Supp. 846). The Court therein stated as follows:

"Charge for Tools

"The defendant charged its loggers with saws, axes, axe handles, wedges, and coal oil. The pertinent Regulation of the Administrator is as follows:

Sec. 531. 1(d). The cost of furnishing 'facilities' which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

"Legality of Regulation

"The Administrator finds tools of the trade and other materials and services incidental to carrying on the employer's business to be facilities. We determine and declare the Regulation to be legal.

"Trade Custom with Respect to Tools—

Conclusion

"The defendant contends that the sawyers of both cypress and pine logs were paid on a contract basis under the terms of which they furnish their services and their respective tools. We find this to be true. It has long been the custom of the trade that log cutters are to furnish their tools. This custom may not prevail or supersede the requirements of a regulatory law. We believe the laborers should be furnished their tools free of charge, as the tools should be considered fundamentally a part of the defendant's plant."

The Court also stated that,

"Administrator's Interpretative Bulletin

"The Administrator, in his Interpretative Bulletin No. 3, paragraph 17, has stated that no objection would be made to a voluntary assignment or order of an employee to pay a sum for the benefit of the employee to a creditor, donee or third party,

'provided that neither the employer nor any person acting in his behalf or interest directly or indirectly, derives any profit or benefit from the transaction.'

"Whether or not in a particular case the employee is any the worse off by reason of the fact that the employer benefits from the assignment, the opportunities for exploiting the transaction nevertheless exist. For practical enforcement and effective administration of the Act on a nation-wide basis, the Administrator's interpretation prohibiting such assignments where the employer derives a benefit or profit is certainly reasonable, if not indeed essential."

Appellants also contend that the action of the company violated Section 3 (m) of the Fair Labor Standards Act and the regulations of the Administrator of the Wage and Hour Division, Section 3 (m) which states:

> "(m) 'Wage' paid to any employee includes reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees."

Section 531. 1(d) of the regulations promulgated by the Administrator states that tools and other materials used in the employer's business are not "facilities" which can be considered in computing wages under Section 3 (m) of the Act. We thus have before this Court, squarely for decision, whether these deductions from employees' wages for tools, sponges, scissors, etc., can be made by an employer when such tools are used in the employer's business.

The District Court on two separate occasions stated that there was a planned attempt upon the part of the employer to circumvent the Fair Labor Standards Act. The Court stated:

> "When they (foremen) told them (employees) that work would start at 6:45 o'clock, they likewise mentioned the hour of 6:31, or if 7:00 A. M. was the starting time, then 6:46 was also designated in some manner. With this picture before us we cannot help but believe that there was a method in this formula beyond that expressed by defendant's witnesses."

The Court continued:

> "The Court found specifically that defendant company through its foremen had sought to circumvent the Fair Labor Standards Act, but we also held that from the evidence, the company should be allowed seven minutes before the starting hour as time spent by employees in checking through time clocks and in going to their places of employment during the day." (Trans. of Record, Vol. I, page 288.)

We submit that if the company was defrauding the employees of credits for time worked, that the employees should be entitled to compensation for *all* time worked as shown by the time records kept by the company and not merely the time in excess of seven minutes in the morning and five minutes in the afternoon, while the employees were actually engaged in their employment tasks. We maintain that they are entitled to credit for *all* time shown on the time cards while going into production in the morning, and in winding up production or maintaining equipment and apparatus at the end of their morning and afternoon shifts.

IV.

Conclusive Evidence Exists That All Employees Worked More Than the Company Gave Them Credit For

We are fortunate in this case that we have such conclusive testimony, even from the officials of the company themselves. Foreman Starner admitted that the employees might have started some time before the regular starting time (*Trans. of Record, Vol. III, Page 1061*). The plaintiff employees all testified that they and the other employees observed by them, all began production work immediately, after checking through the time clocks (Witness Larimer, *Trans. of Record, Vol. III, Page 1155*; Witness Freddle, *Trans. of Record, Vol. II, Page 846*, etc.). Counsel for the appellee has emphasized that a judgment cannot be based on speculation and further that the plaintiff-employees below had the burden of proof of showing with reasonable certainty the amount of overtime worked. It is the position of the appellant-employees that beside the oral testimony given throughout the months of hearings that they have been able to produce overwhelming and conclusive proof of the *exact* time worked. Each

of them is able, even now, to point to the time clock cards and show his exact working time each day during the periods in controversy. It is unusual, in most situations, for employees to show with such exactitude the time worked. But in this case the evidence is and has been before the courts showing practically every minute worked. While it is true that employees were required to work on Monday morning and at some other times before they were permitted to punch their time clock cards as a general rule, there is in evidence a time card showing thereon the exact time when each employee checked in and the exact time when each employee checked out. True, the company contends that the employees, in setting up machinery, cutting decals, taking water off of materials, stirring the mixtures and doing such other activities, were not doing "productive work," but as we must recognize, and the Supreme Court has indicated, employees are to be given credit for "working time" even though each second of their time is not spent in physical operation of machinery or mental exertion in employer's behalf.. If the employer wishes to do so, he may "if he chooses, hire a man to do nothing, or to do nothing but wait for something to happen." (*Armour & Co. v. Wantock*, 32 U. S. 126, decided by U. S. Supreme Court December 4, 1944.). We do not have here, therefore, a mere case of determining waiting time. We are conclusively shown in the instant case the following:

(1) That the employer, the night before, ordered the employees to be on his premises ready for productive work at a specific time.

(2) The testimony of the parties that they punched the time clocks and immediately went into productive work.

(3) That the time clock cards showing the exact minutes and hours worked by all of said employees.

We believe that the Court herein will observe answer to appellee's complaint that the formula adopted by the Court below "does not take into account the admitted occasions when employees started work late." While we have pointed out that we are in disagreement with the formula insofar as it fails to permit employees to be paid for all time represented upon their time clock cards, we nevertheless wish to emphasize that the employer could not suffer loss when an "employee started work late." The employer was bound to win in the bookkeeping set-up which it inaugurated in this case. If the employee came at 6:31, he was given credit for work only from 6:45. If he came at 7:31, he was given credit only from 7:45. In other words, irrespective of the time he started to work, the employee was always paid from the subsequent quarter hour. Of course the District Court below observed that the vast number of employees arrived during a particular fifteen minute period, and that "by eight minutes to seven o'clock only a few stragglers were left." *(Trans. of Record, Vol. I, page 242.)* But irrespective of the particular fifteen minute period in which the employee checked in, he was, nevertheless, *always* paid only from the subsequent quarter hour!

THE RECORD HEREIN REVEALS THAT WORKING TIME OF THESE EMPLOYEES, UNDER THE FAIR LABOR STANDARDS ACT, BEGINS WITH CHECKING IN AND ENDS WITH CHECKING OUT.

The Court will notice from the testimony adduced at the trial herein, that this case is not the usual one of defining what constitutes "waiting time," inasmuch as these productive employees were piece workers who prepared themselves for their productive tasks *before* checking through the time clocks. The only records kept by the employer, who is required to keep records under the Act, are these very time clock cards. It is true that the employer assigned the employees to different work benches and some of these benches were slightly more distant from the time clock than were other benches. The decision where the employee labored was, of course, that of the employer. (The plant lay-out appears in Exhibit 30-A, Vol. III Trans. of Record, page 1524.)

Judge Cavanah held that the time spent in going from time clock to work benches in such cases must be deemed compensable, *Sunshine Mining Company v. Carver* (D. C. Ida. 1941), 41 Fed. Supp. 60, since, after all, the employer determines the location of the work bench, whether it be near or far from the time clock. In this case, which is much stronger, the employer stood alongside of the time clock to see that the employees checked through quickly and then hastened to their work benches. The District Court below indicated that it was obvious that piece workers find a mutual agreement with the employer in getting into production as quickly as possible since, in that fashion, their earnings may be increased.

Much of the law concerning the meaning of travel time as working time is, of course, already decided by the United States Supreme Court in the portal-to-portal case of *Tennessee Coal, Iron & Railroad Company v. Muscoda Local 123, etc.*, 321 U. S. 590 (1944). This case is significant, furthermore, in outlawing customs in an industry, or in a trade union contract, which are inconsistent with the express words of an Act of Congress. The special master in this case had made a finding of fact that the employees of the Mt. Clemens Pottery Company had not complained about the practice of not getting paid according to the time worked as shown by the time cards, and that the system of computing time "had been in effect without change for several years prior to this suit." The Fifth Circuit Court of Appeals in the *Tennessee Coal & Iron case*, 135 Fed. (2nd) 320, answered that argument when it declared, with subsequent approval by the Supreme Court:

> "It may be conceded, *arguendo*, that for twenty-five years prior to 1936, iron ore miners had not been compensated for travel time, and that even after 1938, the *parties to this suit* had entered contracts whereby it was agreed that no wages should be paid for travel time . . . Industrial custom does not warrant the continuation of abuses that the Act was created to rectify; and no contractual agreement that compensation should not be paid for travel time is valid if in conflict with the Act."

The Court further stated:

> "The jurisdiction of the Court below and of this Court having been rightfully invoked, we are compelled to decide the issue as to work-time without regard to what may be the result of an accounting between the parties."

And further:

> "Applying Section 7 of the Act to the facts of this case, we hold that the time spent by under-

ground mining employees of appellants, from the time they were required to report and did report for work at the portal of the mine until they returned to the portal of the mine at the end of the shift, less the regular lunch period when they were relieved of all duties, constituted working time comprising the work-week; that appellants have not compensated said employees for some of said working time; and that reference of the cause to a master for calculation of amounts due said employees was proper."

The United States Supreme Court subsequently declared in the *Tennessee Coal, Iron & Railroad Company case, supra*:

> "Travel time is spent for the benefit of petitioners and their iron ore mining operations."

The Court also stated that,

> "It matters not that such travel is, in a strict sense, a non-productive benefit. Nothing in the statute or in reason demands that every moment of an employee's time devoted to the service of his employer shall be directly productive. Section 3 (j) of the Act expressly provides that it is sufficient if an employee is engaged in a process or occupation necessary to production. Hence employees engaged in such necessary but not directly productive activities as watching and guarding a building, waiting for work, and standing by on call have been held to be engaged in work necessary to production and entitled to the benefits of the Act. Iron ore miners traveling underground are no less engaged in a 'process or occupation' necessary to actual production. They do more than 'stand and wait' (citations). Theirs is a fossorial activity bearing all the indicia of hard labor."

The United States Supreme Court has thus determined finally that waiting or travel time upon employer's prem-

ises is working time, under the Fair Labor Standards Act of 1938. It appears clear that employees who are "engaged to wait" must be paid no less than if they were working, their compensation reflecting both waiting time and time spent in performance of the task itself. The Supreme Court has made the clear distinction, of course, that those "waiting to be engaged" are not employed, but that those who after being employed, or after reporting for work, are "engaged to wait" for materials, awaiting instructions, or assignment of activities, are entitled to compensation under the Act. *Armour & Company v. Wantock*, decided December 8, 1944, 323 U. S. 126; and *Skidmore v. Swift & Company*, 65 Sup. Ct. 161.[1]

The Administrator of the Wage and Hour Division, whose opinions at least are given respectful and earnest consideration by the courts and litigants, has therefore come to hold uniformly that payment is to be made for travel time in practically all industries. The Division has therefore extended to the West Coast lumber industry the rule established by the Supreme Court in the *Tennessee Coal, Iron & Railroad Company* case, *supra*, to the effect that it will henceforth enforce the Fair Labor Standards Act to the extent that time spent in travel to, from, or between the sites of logging and lumbering operations is to be paid for as time worked. (Vol. 7, Wage & Hour Reporter, page 1131, dated December 4, 1944.) See footnote.

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[1]Additional cases establishing the same point are as follows:

Walling v. Frank, 62 F. Supp. 261 (W. D. Ky.).

Walling v. Blue Mt. Logging Co., No. 380, decided Oct. 13, 1942 (W. D. Wash.).

Ulle v. Diamond Alkali Co., 8 Wage Hour Rept. 1043 (N. D. Ohio).

Alberts v. Porter, 10 Labor Cases, par. 62,809 (N. D. Ill.).

Ballard v. Consolidated Steel Co., 61 F. Supp. 996 (S. D. Calif.).

Edmondson v. Yellow Truck & Coach Co., 8 Wage Hour Rept. 187 (E. D. Mich., 1945).

In the last analysis, the employer herein has arbitrarily said, despite the repeated warnings of the Wage and Hour Division, and over the objection of the employees,

> "We will pay the workers only from the succeeding quarter hour, irrespective of the time they actually started work."

If the employer can thus impose his own formula, why can't the employer say with equal consistency,

> "We will henceforth pay only for a half hour, or an hour, after the employee begins his productive work."

The answer to this type of employer's reasoning is, of course, in the Act of Congress and in the courts of the land!

The plaintiff employees herein contend that there is little factual or legal difference between this case and the *Tennessee Coal and Iron Company* and the *Jewell Ridge Coal Company* cases, *supra*, heretofore decided by the United State Supreme Court. The contention of these employees is that they should be paid by the time clock cards as maintained by the employer herein. The employees would spend a short time traveling between the time clocks and their work benches and it is contended that that activity, after punching the time clocks, bears all the indicia of work as described in said decisions of the United States Supreme Court and more particularly described below.

1. Physical and mental exertion expended by the employees on the employer's premises.

2. Said exertion was controlled or required by the employer.

3. Such exertion was pursued necessarily and primarily for the benefit of the employer and his business.

As the District Court below specifically found, the appellee company required its employees to report for work at 14 minutes to 7:00 o'clock in the morning, starting them practically immediately, and yet computed their hours from 7:00 o'clock continuing this practice throughout the day, at lunch time and at the close of work in the afternoon, so that, in fact, the employees worked as much as approximately 56 minutes every day, which time was never computed in determining overtime. *(Trans. of Record, Vol. I, page 240.)*

The District Court below found, as a fact, after extensive study of the time clock cards, that a vast majority of the employees had checked through the time clocks more than 10 minutes prior to 7 o'clock and

> "by 8 minutes to 7 o'clock, but a few stragglers were left." (Trans. of Record, Vol. I, page 242.)

The Special Master did not discuss this fact in his report and the District Court's Opinion and Finding of Fact is the *only* finding of fact on this point. Plaintiff employees state that the Circuit Court of Appeals for the Sixth Circuit took no evidence whatsoever on this matter and that said Circuit Court of Appeals did not determine that said Finding of Fact was in any respect erroneous, but did, nevertheless, reverse the District Court's finding.

THE DISTRICT COURT DID NOT FIND THAT THE TIME SPENT BY THE EMPLOYEES IN CHECKING THROUGH THE TIME CLOCKS OR IN GOING THEREFROM TO THEIR PLACES WAS "WORK TIME," BUT DID FIND THAT SAID ACTIVITIES SHOULD BE CREDITED TO THE EMPLOYER AND DEDUCTED FROM THE TIME SHOWN ON THE TIME CARDS

Although the plaintiff employees contend that the United State Supreme Court has now firmly established the rule that employees performing such productive labors on the employer's premises, and at the employer's request, should be paid for the entire time so spent, the United States Circuit Court of Appeals for the Sixth Circuit has decided herein exactly the opposite, the Circuit Court holding that an employer could require its employees to report on the premises and undertake productive labors at any time, disregarding time clock records entirely—and then pay said employees only for an arbitrary "starting time," which begins a considerable time after actual productive labors are undertaken.

While it is the contention of the plaintiff employees that this case is not unlike the *Tennessee Coal and Iron Company* and the *Jewell Ridge Coal Company* cases, *supra*, we respectfully point out that the trial court herein, in its decision of March 3, 1945 *(Trans. of Record, Vol. I, page 287)* did not base its judgment for the pliantiff employees upon the basis that the time spent by the employees in checking through the time clocks, or in going to their work places, was strictly, "work time." Instead, the District Court indicated that *time spent in these activities should be credited to the employer and deducted from the time shown on the time cards.* The District Court simply adopted a formula providing that the *employer* should be

given a credit of 7 minutes, in reporting in in the morning, and 5 minutes in reporting back after lunch in the afternoon. Indeed, the formula still permitted the employer to receive as much as 14 minutes of each employee's time in checking out at noon and checking out in the evening!

The Circuit Court of Appeals for the Sixth Circuit, however, treated this case as an ordinary travel time case and completely misconstrued the District Court's decision and the latter's adoption of a formula crediting the employer with certain work time as shown by the employee's time cards.

Thus, we have herein a case in which the question presented is one which was expressly reserved by the United States Supreme Court in the *Tennessee Coal and Iron Company* and the *Jewell Ridge Coal Company* cases, *supra*. In the former it was stated, "This does not foreclose, of course, reasonable provisions of contract or custom governing the computation of work hours where precisely accurate computation is difficult or impossible" and in the latter case, "Nor do we make any intimation at this time concerning the validity of agreements whereby, in a *bona fide* attempt to avoid complex difficulties of computation, travel time is averaged or fixed at an arbitrary figure and underground miners are paid on that basis rather than according to their individual travel time." The District Court, after extensively examining the evidence and exhibits did, in fact, adopt a formula, subsequently described by the Circuit Court as "arbitrary," *(Trans. of Record, Vol. I, page 1594)* of crediting the employer with certain minutes of the employee's work time. The Circuit Court in this case actually characterized an award for hours worked, minus travel time roughly computed, as a "judgment based upon surmise and conjecture which cannot be sustained." *(Trans. of Record, Vol. I, page 1596.)*

Petitioning employees throughout these proceedings have argued that because of the impossibility of calculating travel time to the exact second the reviewing court should compel a modification of the trial court's decision by cancellation of the deduction given the employer herein. The employees sought, instead, an order that the employees be given full recovery from the employer for the amounts shown on the time cards. The employer is required by Section 11 (c) of the Act and the Regulations thereunder to maintain records of the hours worked by the employees. The company records show hours worked for which the employees were not in fact paid. The District Court found that part of the time shown by the records for which the employees were not in fact paid was spent in productive work on the job *(Trans. of Record, Vol. I, page 242)*. Under these circumstances it would seem elementary that the employer must carry the burden of showing wherein its records were erroneous because of the inclusion of time therein which ought not be considered working time. Because of the Circuit Court's mention of the *Tennessee Coal and Iron Mining Company* case *we respectfully call attention to the fact that the Circuit Court misconceived the District Court's decision herein and erroneously treated the trial court's formula as allowing pay for travel time, whereas it was in fact an effort to credit the employer with working time of the employees.*

ARE PIECE WORKERS ENTITLED TO PAY AT THE RATE OF TIME AND ONE-HALF THEIR REGULAR RATE OF PAY FOR WORK PERFORMED DURING HOURS IN EXCESS OF THE STATUTORY HOURS SET FORTH IN THE ACT?

The appellee company herein has, throughout the years consumed in this litigation, argued that the Act did not apply to piece work performed during overtime labors. Appellee's counsel has argued the question at some length, and state that while the employees are entitled to time and one-half their "*guaranteed* rate of thirty cents an hour," they are not entitled to compensation upon the production of pieces turned out during their overtime periods. They admit that the compensation of most of the employees herein was based upon the number of pieces made and that "for practical purposes their earnings depended on their production or on their piece rates rather than on the guaranteed regular hour rate."

We submit that with the decision in the case of *United States v. Rosenwasser*, decided January 2, 1945 (Vol. 8, page 1, Wage and Hour Reporter), the United States Supreme Court has now conclusively laid down the controlling rules in such cases.

The Supreme Court stated that the Fair Labor Standards Act applies to employees compensated at piece rates, that

> "neither policy nor legislative history gives any real basis for excluding piece workers from the benefits of the statute. This legislation was designed to raise substandard wages and to give additional compensation for overtime work as to those employees within its ambit, thereby helping to protect this nation 'from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.' "

The Supreme Court held that Section 6 (a) in speaking of minimum rates in terms of hourly standards and Section 7 (a) in referring to "regular rate" which had been defined by the United States Supreme Court in terms of "hourly rate" certainly do not preclude application of the Act to piece workers. This holding of the Supreme Court, therefore, is exactly opposite to the contentions of the appellee herein.

The Supreme Court stated that

> "The plain words of the staute give an even more unmistakable answer to the problem. Section 6 (a) of the Act provides that 'every employer' shall pay to 'each of his employees who is engaged in commerce or in the production of goods for commerce' not less than the specified minimum 'rates' which at present are 'not less than 30 cents an hour.' Section 7 (e) provides that 'no employer' shall employ 'any of his employees' for longer than specified hours in any week without paying overtime compensation 'at a rate not less than one and one-half times the regular rate at which he is employed.' "

Of course, no difficulty exists in the instant case in determining what is the regular rate of pay of these piece workers. The employer reduced the earning of each employee, at the end of either one week, or at the end of two weeks, to an hourly rate by dividing the total earning at piece rates by the number of hours worked (without, however, giving overtime). We submit that appellee's contention, therefore, is completely negated by the following holding of the Supreme Court in the *Rosenwasser case, supra.*

> "The fact that Section 6 (a) speaks of a minimum rate of pay 'an hour,' while Section 7 (a) refers to a 'regular rate' which we have defined to mean 'the hourly rate actually paid for the normal, non-overtime work-week.' *Walling v. Helmerick &*

Payne, Inc., 323 U. S. (7 WHR 1054) (slip-sheet opinion, p. 3), does not preclude application of the *Act to piece workers. Congress necessarily had to create practical and simple measuring rods* to test compliance with the requirements as to minimum wages and overtime compensation. It did so by setting the standards in terms of hours and hourly rates. But other measures of work and compensation are not thereby voided or placed outside the reach of the Act. Such other modes merely must be translated or reduced by computation to an hourly basis for the sole purpose of determining whether the statutory requirements have been fulfilled. *Overnight Motor Co. v. Missel*, 316 U. S. 572, 579 (2 WH Cases 47); *Walling v. Helmerick & Payne, Ins., supra.* These hourly standards are not so phrased as reasonably to mislead employers into believing that the Act is limited to employees working on an hourly wage scale. *Nor can a court rightly use these standards as a basis for cutting off the benefits of the Act from employees paid by other units of time or by the piece. If that were permissible, ready means for wholesale evasions of the Act's requirements would be provided.*" (Italics ours.)

CONCLUSION

The writ of certiorari in this case was granted on October 15, 1945. The decision of the Circuit Court of Appeals for the Sixth Circuit, reversing the District Court below, is now to be reviewed by the highest court in the land. This decision will determine the law in the United States as to working time in our industrial plants and this court will settle this extremely important point of law and remove the uncertainties which have resulted from the decision of the Circuit Court of Appeals in setting aside the reasoned formula of the District Court. It is the con-

tention of the plaintiff-employees that the decision of the Circuit Court of Appeals in setting aside this formula has violated the applicable decisions of the United States Supreme Court.

The plaintiff-employees began this action in 1941 by filing a complaint, stating a cause of action for themselves "and for all employees similarly situated." The plaintiff employees have diligently prosecuted this action through the ensuing years and shown conclusively that the employees worked specific hours in excess of the statutory number set forth in the Act without payment at the rate of time and one-half for overtime. We have shown that time cards correctly record the actual working time, and that the employees went into production work immediately after punching the time-clock cards. We have shown that the employer imposed a formula of its own to the effect that pay would be given the employees "only from the subsequent quarter hour," irrespective of the actual starting time. We submit that the employer thus adopted to its own profit, and to the loss of the employees, the wages owing for working time. Appellants contend therefore, that in failing to pay these employees for all working time, rather than only the time decided upon by the employer, i.e., "the subsequent quarter hour" after checking in, that the employer violated the specific requirements of the Fair Labor Standards Act of 1938.

Appellants have shown that as piece workers, engaged in the production of goods for interstate commerce, the Act applies to them, that in working more than the statutory number of hours set forth in the Act, without overtime compensation being paid them in accordance with the specific requirements of the Act, that they have stated a cause of action and that the employer, under the order of the court, should make an accounting for all unpaid

working time. We maintain furthermore, that the worker, under the circumstances in this case, should not be required to pay for the tools and facilities he uses in the employer's business, and that in no event should the employer be permitted to deduct from the employee's pay check an amount in excess of the actual cost of the tools purchased by the employer, and used by the employee in the employer's pottery business.

We have shown that these employees were engaged in the production of goods for interstate commerce and that they are "within the ambit of the Act," irrespective of whether they worked on an hourly or upon piece-work basis, and that by reason of the evidence shown by the record herein, these appellants are entitled to have an accounting and to be paid for all overtime compensation accruing to them for the work-time shown upon the time cards, for which amount the appellants respectfully ask this Court to enter judgment.

We contend that precise computation of the employees' working time could be arrived at if this Court will order an accounting of the employees' time as shown on each of the payroll records. A Special Master could easily make such a computation from the available records. However, the District Court granted the employer a very substantial amount of the employees' working time when it said that the time spent in checking through the time clocks and in going to the work benches, (stated by the District Court as 7 minutes in the morning and 5 minutes in the afternoon) should be credited to the employer and deducted from the time shown on the time cards. The computation under the latter formula was easily arrived at by the employer and such computations appear in the record herein *(Trans. of Record, Vol. I, page 297)*. We respectfully urge the Court herein to grant the relief asked

for in the complaint herein, reversing the decision of the Circuit Court of Appeals for the Sixth Circuit and entering a final judgment for the plaintiff employees.

Respectfully submitted,

EDWARD LAMB,
1014 Edison Building,
Toledo 4, Ohio,

LEE PRESSMAN,
718 Jackson Place, N. W.,
Washington, D. C.,
Attorneys for Plaintiff-Employees,
Steve Anderson, et al.